STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED August 25, 2000
v	No. 219448 Wayne Circuit Court Criminal Division LC No. 94-002399
GAMELIEL WARE, Defendant-Appellee/Cross-Appellant.	

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Following a joint jury trial with codefendant Lamont Card, defendant was convicted of first-degree premeditated murder and first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). In an amended judgment of sentence, defendant was sentenced to a single term of life imprisonment for a conviction on one count of first-degree murder,[1] and a concurrent term of 180 to 271 months' imprisonment for the assault with intent to murder conviction, to be served consecutive to a two-year term for the felony-firearm conviction.[2] Subsequently, the trial court granted defendant's motion for a new trial on the basis of ineffective assistance of counsel. Plaintiff now appeals that decision by leave granted. Defendant cross-appeals, challenging his conviction on alternate grounds. We vacate the trial court's order granting a new trial and remand for reinstatement of defendant's convictions and sentences.

[1] The amended judgment of sentence, dated July 31, 1997, indicates that defendant's conviction and single sentence is for one count of first-degree murder supported by two theories, i.e., premeditated and felony murder. See *People v Bigelow*, 229 Mich App 218, 222; 581 NW2d 744 (1998).

[2] Defendant was initially sentenced to serve 180 months to 240 months on his armed robbery conviction. The amended sentence deleted any reference to the armed robbery conviction. We assume that defendant's conviction and sentence for armed robbery were vacated in that it was the predicate felony underlying the felony murder theory. See *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

Plaintiff argues that the trial court abused its discretion in granting defendant a new trial on the basis of ineffective assistance of counsel. We agree. This Court evaluates a claim of ineffective assistance of counsel under the following standard set forth in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless, a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

A defendant is presumed to have received the effective assistance of counsel and bears the heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

In this case, the trial court's decision is based principally on trial counsel's failure to call as witnesses at defendant's *Walker*[3] hearing, Detroit Police Sergeant Moore and defendant's brother, Chappell Ware. As he did below, defendant argues on appeal that Moore's trial testimony and Ware's testimony at the *Ginther* hearing would have corroborated essential aspects of defendant's testimony at the *Walker* hearing, and thus supported defendant's credibility. The trial court concluded that if this testimony were offered, the "pretrial judge might have granted the defendant's motion to suppress his written statement to the police at the *Walker* hearing." Additionally, the trial court concluded that, independent of the result of the *Walker* hearing, the "result at trial may have been very different" had defense counsel moved to suppress defendant's oral statement to Moore "based upon the failure to Mirandize or the illegal arrest."

After reviewing the record, we conclude that there is nothing in the testimony of either Ware or Moore that strengthens or confirms defendant's claims at the *Walker* hearing that at no time before he gave his written statement to police was he advised of his *Miranda*[4] rights, that he did not initial the written statement, and that he never told Officer Collins that he shot anyone. Thus, we believe there is no factual support for finding that had Ware and Moore been called at the *Walker* hearing the presiding judge might have granted defendant's motion to suppress his written statement.

Further, we believe there is no basis for the trial court's conclusion that the trial result may have been different had defense counsel moved to suppress defendant's oral statement to Moore. The premise that the trial result may have been different must necessarily be predicated on the unexpressed

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[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

assumption that a reasonable probability exists that such a motion would have been granted.[5] We believe the record does not support such an assumption.

In any event, even assuming that defendant's oral and written statements would have been suppressed, we conclude that defendant fails to establish that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995). The evidence at trial established that defendant and codefendant Card were the only passengers in the backseat of the vehicle on the night of the shooting. The car was being driven by decedent Carlos Graves. Defendant was seated directly behind Williams, who was seated on the passenger side of the front seat. Williams testified that he heard a gunshot from within the car and saw a flash, and that codefendant Card had a gun to the back of Graves' head. Williams testified that Card then pointed the gun at his head and shot him, and that he was also shot in the right shoulder, but he did not see who shot him. Williams testified that, after he was shot, he fell into Graves' lap, whereupon defendant reached forward and put the car into park. After pulling Williams and Graves from the car and dumping them in the street, defendant and Card drove off. The police found Graves' car later that day, parked on a street near Card's house. We believe that even if defendant's oral and written statements had been suppressed, the trial result would not have been different in light of the evidence showing that defendant acted in concert with Card in shooting Graves and Williams, and in taking Graves' vehicle.

On cross-appeal, defendant first claims that trial counsel was also ineffective because he: (1) failed to object to Officer Collins' testimony as nonresponsive; (2) failed to request a self-defense instruction; (3) failed to object to alleged prosecutorial misconduct; and (4) failed to object to the giving of a jury instruction on aiding and abetting. We disagree.

First, the record indicates that Officer Collins' testimony was responsive to the question asked. Second, we conclude the decision not to request a self-defense instruction was a matter of trial strategy that we will not second guess on appeal. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Third, we see no error in counsel's failure to raise an objection to the conduct of the prosecutor because we conclude that there is no merit to defendant's claims of prosecutorial misconduct. The record does not establish that the prosecutor failed to comply with a discovery request as required by MCR 6.201(F). Rather, the record indicates that the prosecutor immediately notified defense counsel on the first day of trial about the existence of the bullet casings and turned over the lab analysis as soon as it was available. Nor do we find any merit to defendant's claims that the prosecutor appealed to the fear and sympathy of the jury, or argued facts not in evidence. Counsel was not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Fourth, because we believe that the evidence presented at trial supported the giving of a standard jury instruction on aiding and abetting, we see no error in the failure to raise an objection to the instruction. *Id.* In reaching this conclusion we necessarily reject defendant's related assertion that the trial court erred in giving the instruction.

[5] If such a motion would have been futile, then there is no way that it could have possibly affected the trial result.

We also reject defendant's assertion that reversal is required because the trial court denied the jury's request to have the testimony of various witnesses read back to them during deliberations. The record establishes that the court did not foreclose the possibility that the testimony in question could be provided later. MCR 6.414(H); *People v Howe*, 392 Mich 670, 678; 221 NW2d 350 (1974); *People v Robbins*, 132 Mich App 616, 618; 347 NW2d 765 (1984).

Defendant also claims that the use of dual juries denied him due process of law. However, the record indicates that defendant stipulated to this procedure, thereby waiving any claim of error. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). In any event, we conclude that the trial court did not abuse its discretion in using dual juries. Defendant has made no showing or offer of proof that his right to a fair trial was prejudiced or that the defenses were mutually exclusive. MCL 768.5; MSA 28.1028; MCR 6.121(D); *People v Hana*, 447 Mich 325, 346-350; 524 NW2d 682 (1994).

Finally, we reject defendant's argument that there was insufficient evidence presented at trial to support his conviction for felony murder. Viewed in a light most favorable to the prosecution, *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995), we conclude that sufficient evidence was presented to enable a rationale trier of fact to find beyond a reasonable doubt that defendant aided in the murder of Graves in the course of taking his vehicle. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995); *People v McCray*, 210 Mich App 9, 13; 533 NW2d 359 (1995); *People v Lewis*, 168 Mich App 255, 270; 423 NW2d 637 (1988).

We vacate the trial court's order granting a new trial and remand for reinstatement of defendant's convictions and sentences. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald